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In the Supreme Court of the United States

OCTOBER TERM, 1984

CLAIRE CRANE, ARNOLD CRANE and CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Petitioners,

vs.

EDWARD HINES LUMBER COMPANY, an Illinois corporation, EDWARD L. DAUGHERTY, FRANKLIN I. KRAL and UNKNOWN CO-CONSPIRATORS, both Jointly and Individually,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Was there a deprivation of petitioners' property without due process of the law by respondents' conspiracy to fix the case?

2. Were petitioners denied equal protection of the law by this conspiracy?

3. Does the federal court have jurisdiction to entertain this civil rights case under 28 U.S.C. Sec. 1343(3) and 42 U.S.C. Sec. 1983?

PARTIES INVOLVED*

Petitioners Arnold and Claire Crane were the defendants in the trial court in Circuit Court Cook County, Illinois; plaintiffs in the United States District Court for the Northern District of Illinois, Eastern Division; appellants in the United States Court of Appeals, Seventh Circuit; and petitioners in the Supreme Court of the United States.

Respondent Edward Hines Lumber Co. was the plaintiff in the Circuit Court trial court; Respondents Edward Hines Lumber Co., Edward L. Daugherty, Judge Franklin I. Kral and Unknown Co-Conspirators were defendants in the United States District Court; Appellees in the United States Court of Appeals for the Seventh Circuit; and respondents in the Supreme Court of the United States.

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* Per Rule 21.1(b)

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Arnold Crane and Claire Crane, respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered February 1, 1984 affirming the United States District Court's dismissal of a 42 U.S.C., Sec. 1983 action, and the United States Court of Appeals order of July 10, 1984 denying petitioners' petition for rehearing En Banc.

JUDGMENT AND ORDERS BELOW

United States Court of Appeals for the Seventh Circuit unpublished order dated February 1, 1984 affirming United States District Court for the Northern District of Illinois, Eastern Division's Order. A copy of the order is attached as Appendix "A".

Unpublished Per Curiam Order-Judgment without oral argument of the United States Court of Appeals entered

February 1, 1984. A copy of the order is attached as Appendix "B".

United States Court of Appeals denied petitioners' petition for rehearing en banc on July 10, 1984. A copy of the order is attached as Appendix "C".

United States Court of Appeals' order denying petitioners' motion for Stay of Mandate entered August 9, 1984. A copy of the order is attached as Appendix "D".

United States Court of Appeals Mandate entered August 22, 1984. A copy of the mandate is attached as Appendix "E".

United States District Court, Northern District of Illinois, Eastern Division's Memorandum decision dismissing petitioners' cause of action entered August 17, 1982. A copy of the order is attached as Appendix "F".

United States District Court, Memorandum Order dismissing petitioners' motion for reconsideration, denied August 23, 1982. A copy of the order is attached as Appendix "G".

JURISDICTION

A timely application for extension of time to file a petition for Writ of Certiorari was allowed and this petition for a writ of certiorari was filed before November 7, 1984 as ordered by this court on September 28, 1984. The jurisdiction of this court is invoked under Title 28 United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Sec. 1983. Civil Action for deprivation of rights.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. Sec. 1343(3):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

Amendment VII to the Constitution of the United States:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Amendment XIV to the Constitution of the United States, the relevant portion:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Illinois Revised Statutes, Chapter 110A, Sec. 232 (1977) TRIAL OF EQUITABLE AND LEGAL MATTERS. (Ill. S. Ct. Rule 232(a) & (b)):

(a) Trial of a Single Equitable Cause of Action. When matters are treated as a single equitable cause of action as provided in Rule 135(c), they shall be heard and determined in the manner heretofore practiced in courts of equity. When legal and equitable matters that may be asserted separately are pleaded as provided in Rule 135, the court shall first determine whether the matters joined are properly sever-

able, and, if so, whether they shall be tried together or separately and in what order.

(b) Trial of Joined Equitable and Legal Matters. If the court determines that the matters are severable, the issues formed on the law counts shall be tried before a jury when a jury has been properly demanded, or by the court when a jury has not been properly demanded. The equitable issues shall be heard and decided in the manner heretofore practiced in courts of equity.

STATEMENT OF THE CASE

Petitioners had done businesss with Hines since the 1940's-1950's under the trade styles Crane Construction Company and Claire Crane Construction Company, as a general contractor.

On this job all invoices and statements for lumber and millwork had been addressed to, and sent to, Crane Construction Co. from December 5, 1975 until June 30, 1977, the day after Hines filed a mechanics lien claim (June 29, 1977) against Claire Crane d/b/a Claire Crane Construction Co. The last day Hines sold materials to Crane Construction (never to Claire Crane d/b/a Claire Crane Construction Co.) was March 23, 1977, approximately one hundred (100) days before they changed the billing name to Claire Crane d/b/a Claire Crane Construction Co. The billing name was changed after the controversy regarding the latent defective materials arose.

LATENT AND NON-CONFORMING DEFECTS

Hines was notified immediately of all latent and nonconforming defects as they arose, as is the accepted custom and practice in the trade, that: (i) the yellow pine 2x10x16 floor joists were unstable (green) and the floors raised and sagged excessively; (ii) the lumber in the 6-panel white pine wood interior 1⅜" prehung doors was unstable (green); and (iii) the white pine wood colonial jambs were rough cut on one side. Hines' "Terms of Sale" paragraph 15, states:

> "15. IMPLIED WARRANTIES — SELLER MAKES NO WARRANTY of merchantability except that it warrants that the materials will pass without objection in the trade under the proposal description. Further Seller makes no warranty that the materials to be sold hereunder are fit for any particular purpose."

Hines confirmed in letters, after an oral compromise and normal settlement agreement, that credits were due but none were ever issued.

CAUSE OF ACTION

On May 19, 1978, Hines filed a cause of action to foreclose a mechanics lien claim in the Chancery Division of Circuit Court Cook County, Illinois.

Petitioners' attorney filed an answer and jury demand. In addition to the filing of a timely jury demand, which Judge Kral had knowledge of, petitioners, on February 5, 1979, filed a motion to amend their answer and counterclaim (which was granted) and cited *Powers Electric* v. *Maywood-Proviso State Bank*, 377 N.E.2d 142 (1978), p. 143 - Footnote 1, so that the court would again be reminded that petitioners wanted a jury trial on all the law counts and issues therein, and to support their position, and so the court would not deliberately and maliciously try the law counts and issues in Chancery that properly belonged in the Law Division. We cite from that motion:

> "In the instant case, defendants, *under no circumstances, waive their rights to trial by jury.*"

Judge Kral oppressively held the case in Chancery for thirty (30) months until after he rendered his decision for Hines instead of transferring it to the Law Division according to existing Illinois law.

TRIAL IN CHANCERY AND JUDGMENT ORDER

All the respondents were aware of Arnold Crane's life threatening disabilities and continuing poor health, yet Hines insisted on trying the case in Chancery on June 3rd and 5th, 1980 when, due to Crane's poor health the trial

BEST AVAILABLE COPY

was continued to, and held on July 20, 21, 22, 1981, at which time the trial was concluded.

On September 15, 1981, Judge Kral entered a judgment order re Count 1 of Hines' complaint, finding of a valid mechanics lien and judgment for Hines; and on September 15, 1981 entered an order allowing Hines' motion for sanctions, attorneys fees, and costs.

POST TRIAL MOTIONS

On October 13, 1981 Judge Kral (i) allowed petitioner's motion for stay of execution of his judgment order and (ii) stay of execution on his order allowing Hines' sanctions until after trial has been held on petitioners' counterclaim in the Law Division and judgment is entered.

On or about December 5, 1981 Hines filed a motion for summary judgment in the Law Division of the Circuit Court alleging res judicata as to petitioners' five (5) law counts in their amended counterclaim. Judge Wolfson, Law Division, denied Hines' motion because petitioners had made timely requests for a jury trial on all factual issues. On May 10, 1982, Judge Wolfson denied Hines' motion for reconsideration of his March 29, 1982 order.

On July 20, 1982, petitioners filed a complaint in the United States District Court, 7th Circuit, Eastern Division, under the Civil Rights Act, Title 42 U.S.C., Sec. 1983 and Jurisdiction under Title 28 U.S.C., Sec. 1343(3), to protect their constitutional rights and for injunctive relief against Judge Kral and for damages against Hines and Edward L. Daugherty, for acting in continuous active concert and under color of state law with Judge Kral and Unknown Co-Conspirators.

The Court of Appeals denied petitioners' motion filed July 28, 1983 to take judicial notice of the entire record, including exhibits, in Case No. 78 CH 3358 Hines v. Crane in Chancery and Law Division of the Circuit Court in order that an independent examination can be made by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

WERE PETITIONERS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THIS CONSPIRACY AND DOES THE FEDERAL COURT HAVE JURISDICTION TO ENTERTAIN THIS CIVIL RIGHTS CASE UNDER 28 U.S.C. SEC. 1343(3) AND 42 U.S.C., SEC. 1983.

There are important questions arising in this Civil Rights case by a lay-person that warrants the grant of certiorari. In differing ways these questions reflect a serious fault in the administration of the justice system in its relation to lay-persons being denied due process and equal protection of the law by the courts. These faults being of federal constitutional and statutory dimensions can be and should be reviewed and corrected by this Court.

The term "Public Issue" is equivalent to the "Policy of the Law"; it is applicable to the spirit as well as the letter; whatever tends to injustice or oppression, restraint of liberty or legal right; whatever tends to the obstruction of justice, or to the violating of a federal or state statute or federal or state constitution, and whatever is against good morals, is against "Public Policy."

Public corruption violates a strong public policy and is always a continuing national scandal. The philosophy of the courts is to jealously guard the right of the people and public policy should never be a sensitive issue.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this. You must first enable

the government to control the governed; and in the next place oblige it to control itself.

With a definite and firm conviction that a mistake has been committed, it is a lamentable fact that it is necessary for petitioners to come before this Court in order to obtain equal justice under the law.

LATENT AND NON-CONFORMING DEFECTS

The fixing of petitioners' case is an indefensible, inexcusable and reprehensible transgression and is an obstruction of the administration of justice and is a public image of corruption of the judicial system.

Hines and Judge Kral received and read a copy of petitioners' amended answer and counterclaim in open court. They are learned in the law and thus charged with proficient professional knowledge that if petitioners did not prevail on the mechanics lien count in the sham trial in Chancery, Circuit Court Cook County, Illinois, petitioners would not have a prayer of a chance to prevail on any of the law counts in the Law Division. Respondents were out to destroy petitioners' law counts at any cost by depriving them of their property by finding of a valid mechanics lien and judgment for Hines without due process of law, acting in the clear absence of all subject matter jurisdiction. In the instant case, it establishes a prima facie case of respondents' bad faith and the inherent weakness of state law to protect petitioners' constitutional rights.

This Court, or any rational trier of fact, would find the physical objective evidence so overwhelmingly in petitioners' favor that there would be no way in the world for petitioners to lose the mechanics lien claim on the facts and Illinois laws unless it was a conspiracy.

Judge Kral intentionally and vindictively found the consumer, in this case petitioners, responsible for the latent defects found in Hines' building materials. In

Petersen v. *Hubschman Const. Co., Inc.*, 389 N.E.2d 1154 (1979) at 1159, the Illinois Supreme Court ruled that "the builder-vendor is responsible for latent defects." It has been the custom and practice in the building industry, even before the Illinois Supreme Court ruled, that the supplier is responsible for defects or latent defects according to their contract. Petitioners have to stand behind their product (the finished house) and the only way they, as a responsible builder, can stand behind their product is to make the suppliers stand behind theirs.

Judge Kral's findings of facts and conclusions of law are demonstrably false as they were untrue when made and Kral then knew them to be untrue but he made them with reckless indifference to the truth and because of influence and political clout which strains credulity to the point of collapse.

Based on the facts, Kral's findings of fact that all of Hines' materials met industry standards is pathetic and laughable because of the fact that Hines and their attorneys acknowledged by admissions in letters and a compromise that there were latent non-conforming defects, not of a cosmetic nature; that petitioners had credits due them and that they had difficulty in rectifying the unstable floor joist problem. In *Downes Swimming Pool* v. *North Shore Nat. Bk.*, 464 N.E.2d 761 (Ill.App. 1 Dist. (1984), the court said:

> "Under the common law, literal performance was required in order to sustain recovery on a contract but that rule has been ameliorated in building and construction cases, with courts now holding that 'if the owner got substantially the thing for which he bargained, he must pay for it but he is allowed a credit as compensation for the deficiencies existing in what he got as compared to what strict performance would have given him.' *Watson Lumber Co.* v. *Guennewig* (1967), 79 Ill.App.2d 377, 397, 226 N.E.2d 270,

> 280). The same rule has been applied in actions to foreclose a mechanics lien, allowing the defendant-owner a setoff for the cost of repairing defects in the work done. In *Dean* v. *Rutherford* (1977), 49 Ill.App. 3d 768, 770, 7 Ill.Dec. 464, 466, 364 N.E.2d 625, 627, the court noted 'the failure of a contractor to substantially perform the contract in a workmanlike manner entitles the owner against whom a mechanic's lien is sought to a set-off for damages incurred by the failure to perform in a workmanlike manner.' "

Judge Kral knew all these facts to be true as the letters were exhibits at the trial in Chancery and are also part of the federal court record.

In *Economy Lumber of Oakland* v. *Ins. of N.A.*, 204 Cal. Reptr. 135 (Cal. App. 1 Dist. 1984) it is clearly established that cooperation and good faith between the lumber company and the builder are essential elements and is all that is needed to resolve major business disputes. In the instant case, Judge Kral and Hines engaged in obdurate uncooperativeness and became obstructionists due to the conspiracy and because it was to their benefit.

During construction a fire started by the plumbers sweating copper pipes in the mudroom and partially destroyed the garage roof. The mudroom is attached between the garage and main building. The plumbers insurance carrier paid for all damage attributable to the fire and there were no latent defects that were attributable to the fire.

Judge Kral, because of the conspiracy and in bad faith, used the fire as a pretext in an attempt to create an issue of fact in favor of Hines by finding that the building materials were affected by the fire which is pure deception by Judge Kral.

There is no evidence in the record of the sham trial to substantiate that the fire caused any damage to the struc-

tural part of the main building. Judge Kral deliberately went outside the record on more than one occasion for his finding of fact in his judgment order of September 15, 1981, because of the conspiracy. In *Downes Swimming Pool* v. *North Shore Nat. Bank,* supra, the court held:

> ". . . the issues are determined from the pleadings and the evidence. To have evidence without pleading an issue is just as fatal as pleading an issue and not supporting it with evidence. Both are essential and each must conform to the other."

The fire occurred on May 28, 1976 and the doors and jambs that proved to be defective were not delivered to the house until December 6, 1976. Hines is charged with knowledge that the fire in no way affected the building materials.

THE BEGINNING OF THE CONSPIRACY

The question is "How does a judge try a case most effectively and fairly to all parties involved?" The answer lies in thorough and comprehensive pre-trial procedures that resolve in advance all of the problems that may be reasonably anticipated or expected to arise at the trial.

A thorough review of the record in the state court will substantiate that Judge Kral took a one-sided approach of the case. When petitioners demanded a jury trial, and paid for it, they adopted and asserted the position that they are entitled to have a jury resolve all of the issues raised between the parties.

Having failed to coerce petitioners into submission, respondents then altered their course and had the case fixed, which is not a judicial act. Because of the inherently coercive atmosphere, Judge Kral adopted his own rules and standards in bad faith.

Judge Kral was cognizant at all times that he was acting in the clear absence of all subject matter jurisdiction

and demonstrates his disdain, if not outright contempt for the very system which he, as judge, has sworn to administer.

When petitioners did not waive their rights to a jury trial on all issues, respondents recognized immediately that the issues in the law counts were inextricably interrelated, entertwined and inseparable and they had more than a fair warning of what petitioners wanted because they had read their copy of petitioners' motion, so they had them set up in court to be ripped off and the case fixed and used the *Powers* decision, supra, against them in its entirety.

Respondents had the benefit of, and were charged with that established proficient professional knowledge, and the trial by Kral and the other respondents was a sham and anything but a dress rehearsal.

In Hines' and Daugherty's Memorandum in Opposition to petitioners' motion for injunctive relief in the Court of Appeals, they knew they were caught red-handed and were trying to mitigate their damages and agreeing with petitioners, said:

> "In fact, the only possible damage the Cranes could suffer in this entire controversy would occur when Hines executed on its judgment rendered in the Circuit Court of Cook County. As noted above, execution on that judgment has been stayed."

No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate. If Judge Kral was innocent of the conspiracy that petitioners alleged, he was not so disorganized as not to have recognized the fraudulent nature of Hines' scheme by itself, based on all the evidence.

In *Adickes* v. *S.H. Kress & Company,* 90 S.Ct. 1587 (1970), the critical elements missing according to this

court was, "was there a policeman in the store and was there a meeting of the minds and thus reached an understanding and a conspiracy between the police and a Kress employee". (Judgment reversed case remanded). In the instant case, there is no critical element missing that petitioners are aware of to establish all of the elements of a conspiracy. There was an explicit meeting of the minds and thus an immediate understanding was reached, to establish a conspiracy to violate petitioners' clearly established constitutional rights.

In *Adickes,* at 1608, this Court held:

> "(13) It is true that Mr. Powell, the store manager, claimed in his deposition that he had not seen or communicated with a policeman prior to his tacit signal to Miss Baggett, the supervisor of the food counter."

and at 1609, this Court held:

> ". . . If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee has a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service. . . ."

In the instant case, it is established that there is clear and convincing evidence that Judge Kral unscrupulously had an invidious motive to use his office to invidiously discriminate against petitioners by denying them due process and equal protection of the federal and state laws in the clear absence of all subject matter jurisdiction; that there was an explicit mutual understanding, and a meeting of the minds between Judge Kral and the other respondents who consented and acquiesced all the way. These facts speak for themselves.

Judge Kral acted with deliberate ignorance and positive knowledge, which are equally culpable and he put

himself above the law, by his continuous invidious discrimination, which he has sworn to support, by persistently and oppressively failing to transfer the case to the Law Division and insisting on hearing the case in Chancery in Circuit Court in the clear absence of all subject matter jurisdiction even though Kral and the other respondents knew the doctrine of res judicata and its foreseeable consequences.

The element of knowledge may be satisfied by inferences drawn from proof that respondents deliberately closed their eyes to what would otherwise have been obvious to them; respondents' knowledge of a fact may be inferred from willful blindness to the existence of the fact.

Without question, respondents' conduct was egregious and inexcusable; they do not, and indeed could not, justify any of their actions and especially the fixing of the case, where the facts and state law were in petitioners' favor. Respondents thoroughly understood the nature of their conduct and would hence be liable for the conspiracy to violate petitioners' clearly established constitutional rights to due process and equal protection of the law. There is no way this Court can escape the feeling of indignation at the outrageous and odoriferious conduct of respondents.

In *United States* v. *Barbara,* 683 F.2d 164 (6th Cir. 1982), the court stated at 167:

> "The appellant has made no showing that Judge Churchill relied upon erroneous information or forbidden factors. The appellant contends that the statement of Judge Churchill that 'about one-third of the public out there think that lawyers got a license to steal' is 'unsupported by empirical evidence.' A recent study conducted by Yankelovich, Skelly and White, Inc. for the National Center for State Courts supports the observations of the district judge, how-

ever. See *Yankelovich, Skelly and White, Inc. "Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders in State courts; A Blueprint for the Future Proceedings of the Second National Conference on the Judiciary (National Center for State Courts* Pub. No. R0038 (1978)."

Respondents stole the judgment in the sham trial—fixing of the case is stealing. Respondents also stole petitioners' right to be free from deliberate oppression by holding the case in Chancery, for thirty (30) months instead of immediately transferring the case to the Law Division; they stole petitioners' right to be free from invidious discrimination and illegal harassment, which is still continuing.

Petitioners, and not the respondents, were novices and to suggest otherwise serves only to further test the gullibility of the credulous, and require this Court to espouse a naivete unwarranted under the circumstances. This Court should be completely satisfied that respondents' objectives were to conspire to take advantage of petitioners in any way possible to their own benefit by the prevailing flavor of chicanery and sharp practices.

In *Brucar* v. *Rubin,* 638 F.2d 987 (7th Cir. 1980), the court held in Footnote 11, p. 993:

> "Two inferences may reasonably be drawn from the judge's brusqueness: either Mrs. Brucar's objection was so obviously frivolous, that it required no explanation, or it was so obviously meritorious that it could not be explained away. A fact finder could reasonably conclude that Judge Kogut was familiar with Illinois law and therefore must have known that Mrs. Brucar's objection on grounds of the prior transfer was obviously meritorious."

In *Brucar*, Mrs. Brucar orally objected in open court, and in the instant case, the petitioners advised the court, in good faith, in a motion filed February 5, 1979 that they:

> *"under no circumstances, waive their rights to trial by jury."*

In both cases, it would be expected that the judges would be familiar with Illinois law in a routine manner.

Petitioners have an indelible right not to be classified as a second class citizen by these respondents and that's not a superficial distinction. It's not an imaginary situation. Respondents knew that the fixing of the case would make petitioners emotionally distraught and justifiably embittered.

Respondents are selfish and greedy opportunists playing fast and loose with the administration of justice at the publics' and petitioners' expense and the totality of the situation dictates that respondents should be exposed, in the public interest, and be subject to scorn, ridicule and criticism and legal embarassment which they deserve, and that, at a minimum, their private and public reputations will be exposed to opprobrium. This is why they have everything to hide. They cannot be exonerated from their responsibility in the instant case, and they must be forced to pay the price for their subterfuge by this Court.

In the instant case, petitioners are left without full judicial protection and they have no adequate remedy at law in the Illinois state court system.

Most sitting judges in the entire state judicial system are uptight because of the bad, but true, publicity of the "Greylord Investigation"[1] and do not want to rule, or will

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[1] Investigation "Greylord" by the federal government of corruption of unscrupulous members of the bar who were able to bribe and control some of the judges in the Circuit Court of Cook County, Illinois.

not rule, against another sitting judge on the allegations of corruption of the circuit court judiciary. If this Court would allow petitioners to go outside the record they could prove this allegation, and could show the untenable position they are in.

These judges fear the rumors in the press that "this is only the 'tip of the iceberg' and that future indictments of the Greylord Investigation are forthcoming."

There is the insider theory, the clout theory, and the one-of-the-boys theory. They amount to the same thing; When you become part of the fix you become part of a special inner circle. You're one of the wheeler-dealers. You have the power to grant favors that go beyond the law. You wield influence. And influence is what the whole Chicago game—the courts, politics, government, business, money—is all about.

It goes without saying that Judge Kral's judgment order was fixed and set-up in favor of Hines and was designed to aggravate, outrage, frustrate, humiliate, and keep petitioners off balance and saddled with a continuous "catch 22" position, which was obviously to respondents' advantage and executed to put petitioners at a complete legal disadvantage in an uphill fight all the way, especially when trying to persuade and explain their tenable position in their federal court complaint.

In *Yick Wo* v. *Hopkins,* 118 U.S. 356 at 373, 6 S.Ct. 1064 at 1072, 30 L.Ed. 220 (1886) the court said:

> "A fundamental principle of constitutional law is that though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances material to their rights, the denial of equal

justice is still within the prohibition of the constitution."

The *Powers* decision, supra, explicitly warns the attorneys, or anyone else, on how to preserve their rights or their client's rights to trial by jury, when timely demanded, and when legal and equitable claims are involved. Petitioners at no time knowingly and intelligently waived their right to trial by jury as the facts and circumstances clearly show. Petitioners cited *Powers* in good faith, so that they would not fall into the same type of trap that the attorney for the defendant in the *Powers* case did. See *England* v. *Louisiana State Bd. of Med. Exam.*, 84 S.Ct. 461 (1964). The concurring opinion of Justice Douglas on p. 475:

> "Those who read this opinion may have adequate warning. But this opinion like most will become an obscure one—little known to the Bar. Lawyers do not keep up with all the nuances of court opinions, especially those touching on as exotic a rule of federal procedure as the one which we evolve today. I fear therefore that the rule we announce today will be a veritable trap."

Respondents used the entire rationale of the *Powers* decision against petitioners in spite of the fact that they protected their right by *Powers* case law. Judge Kral's bad faith and ill-advised policy of refusing to obey the decisional law in the *Powers* case was disastrous to the outcome of petitioners' case.

The complaint is often made, and sometimes more than often with justification, that there is illegal invidious discrimination favoritism, or other objectionable handling of cases by the courts.

Whether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair

and orderly administration of laws which it was the purpose of the due process clause to ensure. *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

Judges in Circuit Court Cook County, Illinois are, after all members of the same club, and it is not surprising that they react instinctively to defend one of their own who has, in their view, unjustly suffered because of a breach of ethics that is regarded as unrealistic and, little understood. In this circle, members of the general public are considered outsiders. The elite also often views them as alien or unwelcome intruders on their private domain, government.

The oath of office for Illinois Judges is set out in *Chap. 37 of Ill.Rev.Stats. 1981,* State Bar Association Edition as follows:

> "I do solemnly swear (or Affirm as the case may be) that I will support the Constitution of the United States and the Constitution of the State of Illinois and that I will faithfully discharge the duties of Judge of ..... according to the best of my ability."

The Oath of Office for Illinois attorneys is set out in Chap. 13, Sec. 4, Ill.Rev.Stats., 1981, State Bar Association Edition as follows:

> "I do solemnly swear (or Affirm as the case may be) that I will support the Constitution of the United States and the Constitution of the State of Illinois and that I will faithfully discharge the duties of the office of attorney and counselor at law to the best of my ability."

It is indisputable that respondents are playing fast and loose with the administration of justice and making their own rules so the taking of their oaths of office was a meaningless endeavor.

The tip-off is that Judge Kral had a jaundiced offensive eye and was well rehearsed on what his role was in the conspiracy. Indeed they cannot afford to have an independent judiciary looking over their shoulder at what they have done.

This Court should not find it exceedingly difficult to disentangle the whole truth from the tangled web of facts.

Judge Kral knowingly, by deceptive schemes, created a false impression of fact, law, value and intention in manufacturing a pretense of integrity which was aimed squarely at petitioners. In the instant case, the standard for reviewing equal protection matters varies. When fundamental rights are involved, the standard is strict scrutiny.

Petitioners' allegations made in good faith as to the conspiracy and their position is neither exaggerated, oversimplified, or distorted to create unreasonable support for a position that is not otherwise supported by clear and convincing evidence.

It was readily apparent to petitioners that something was radically wrong and Judge Kral and the other respondents were acting in bad faith when the court immediately took the position favorable to respondents for no legitimate legal reason by agreeing with Hines' attorneys, who vehemently objected to petitioners taking depositions of any of Hines' executive employees, managerial employees, and other Hines' employees in petitioners' house/office. Respondents used this exact technique as having the greatest potential of success; however, the course of litigation is rarely predictable except when the outcome of the case is known because it has been fixed. "Good faith" and "bad faith" cannot alternately appear and disappear like the Cheshire Cat in Alice in Wonderland.[2] In *Roberts* v. *Personal Serv.*

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[2] Cheshire Cat: In *Alice in Wonderland,* a grinning cat which gives Alice advice and then fades away. (Webster's New Collegiate Dictionary 2nd Ed. p. 142.)

Ins. Co., 467 N.E.2d 257 (Ohio App. 1983), the Ohio Supreme Court defined the concept of "bad faith", p. 258, holding that:

> "A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."

In the instant case, respondents are being rewarded for acting in bad faith.

The conspiracy would be in serious trouble if depositions were allowed to be taken in petitioners' home/office as the facts of the latent defects speak for themselves (and the sham trial and petitioners' cross-examination of Hines' expert witness established this to a certainty.) This is another example of the ugly senseless conspiracy of an explicit meeting of the minds and thus an immediate understanding that was reached.

It is indisputable that respondents were enjoying illegal judicial protection by the court and they were all aware of the substantial outrageous, burdensome, oppressive, untenable, humiliating, and harassing position petitioners were put in by experiencing respondents' continuous bad faith.

Respondents' conduct is an offense which necessarily involves moral turpitude or reflects on the individual's honesty, fairness or respect for the rights of others and for the law. Judge Kral's moral character should be judged on the basis of his past and present pattern of conduct and behavior. Kral's behavior indicates a willful disregard for the very laws which he seeks to advocate on behalf of the public and the State of Illinois as a state court judge. Judge Kral was not laboring under such a defect of reason as not to know the nature and quality of the act he was

doing; or if he did know it, that he did not know he was doing what was wrong.

Hines was out to get petitioners and give them a frustrating and discouraging lesson, when they filed suit in circuit court, on how to be ripped off and how the judicial system really works when you have influence and clout Chicago style, by engaging in dirty unethical tricks of the trade. Respondents set a legal trap to deprive petitioners of their state constitutional right to a jury trial before an impartial judge for the case to be heard on its merits—not to have the case fixed! The fixing of a case is an incurable disease. Judge Kral disregarded, abused and trampled on the law with a "so what—what are you going to do about it" attitude.

The Holy Bible (*King James Version*) John 8.7 says:

> "He that is without sin among you let
> him cast a stone . . ."

This Court should place this unconscionable, outrageous conduct where it properly and rightfully should lie, on the parties that instigated it. There is no question but that Hines, Daugherty and Unknown Co-Conspirators corrupted the court. Judge Kral is equally guilty where a long train of abuses and usurpations invariably pursuing the same objective and evincing a design to reduce petitioners under his absolute despotism. There should be no question in this Court's mind that Judge Kral had an interest beyond his studied proficient professional legal judgment by being intellectually dishonest.

These respondents, by having the audacity to fix this case are a menace to society, and exhibited a conscious immoral indifference to the consequences. "Immoral" is defined as "not moral"; inconsistent with rectitude, purity, or good morals; contrary to conscience or moral law; wicked, vicious, licentious. See also Ernest Hemingway *Death in the Afternoon* 1932, reprinted in *Bartlett Familiar Quotations*

1044b (1968) "What is moral is what you feel good after and what is immoral is what you feel bad after." In *Barker* v. *Kallash,* 479 N.Y.S. 2d 201 (Ct.App. 1984), the court held on p. 206:

> "It is a basic principle recognized by the courts throughout this country that no person shall be permitted to take advantage of his own wrongdoing by predicating a legal or equitable claim upon his fraudulent, immoral or illegal conduct." (1 *Am.Jur.* 2d, *Actions,* Sec. 51, 52; 1 *C.J.S., Actions,* Sec. 13).

and on p. 207:

> "In deciding such cases, this court has consistently examined the plaintiff's wrongdoing to determine 'whether * * * recovery * * * should be denied for the sake of public interests' and has held that the aid of the courts should be barred only when plaintiff's actions were 'so far against the public good' e.g. clearly inimical to the 'health, welfare and safety of the people of the state' or 'gravely immoral and illegal.' This requirement is dictated by fundamental public policy that the courts of this State shall not honor claims founded on wrongdoing that is morally reprehensible, heinous, or gravely injurious to the public interests."

There should never be any type of tolerance for white collar lawlessness in a court of law. The thrust of a Sec. 1983 action is to protect against the misuse of power by state officials. *Monroe* v. *Pape,* 365 U.S. 167, 184, 31 S.Ct. 473, 5 L.Ed.2d 492 (1961).

In *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 64 S.Ct. 997 (1944), the court said at 1001:

> ". . . tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is the wrong against the institutions set up to protect and safeguard the public institutions in which fraud cannot complacently be tolerated consistently with the good order

> of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

The short answer is that truth and justice is everybody's business, are inseparable and a deliberately false judgment debases the judicial process and is a non-judicial act. In *Accord, 2 J.B. Atlay Victorian Chancellors,* 460 (1908) (quoting Lord Herschell):

> "Important as it was that people should get justice, it was even more important that they should be made to feel more important, that they should be made to feel and see that they are getting it."

It's beyond question that there comes a time when enough is more than enough. It's just too much. The time has come in this case too, when it's just "too much."

Judge Kral insidiously and carefully crafted all material findings of fact against petitioners. It is well established that a statement which is technically true as far as it goes may nevertheless be fraudulent where it is misleading because it does state matters which materially qualify the statement as made. In other words a half-truth is sometime more misleading than an outright lie. In *37 Am.Jur. 2d Fraud and Deceit,* Sec. 183, it is said at page 246:

> "* * * It is an old adage that half a truth is a lie. Thus, a statement which is technically true in fact as far as it goes may also be fraudulent, where it is misleading because it does not include all the material facts."

In *37 C.J.S. Fraud,* Sec. 16, it is said, at page 247:

> "* * * One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes. Such concealment is in effect a false

representation that what is disclosed is the whole truth."

In the *Matter of Special February 1977 Grand Jury Appeal of United States of America,* U.S.Ct. of App. 7th Cir., 581 F.2d 1262 (1978), p. 1264, the court said:

> "When an attorney discovers a possible ethical violation concerning a matter before a court he is not only authorized but is in fact obligated to bring the problem to that court's attention. Nor is there any reason why that duty should not operate, when, as in the present case, a lawyer is directing the court's attention to the conduct of opposing counsel. In fact, a lawyer's adversary will often be in the best position to discover unethical behavior."

It is a persistent, widespread, common and well settled custom and practice that represents the official policy of the state courts to intentionally frustrate and harass lay persons whenever they endeavor to pursue their own case. In *Pulliam* v. *Allen,* 104 S.Ct. 1970 (1984), this Court cited case statistics at 1988:

> "Footnote 16. Civil rights cases accounted for 8.3% of the total civil litigation in the federal district courts for the twelve months ended June 30, 1982, and in 1982 civil rights suits filed by state prisoners against state officials had increased 115.6% over the number of similar suits filed in 1977 before the prospect of a fee award under Sec. 1988 became an added incentive to Sec. 1983 claims. *Annual Report of the Director of the Administrative Office of the United States Courts* 100-103 (1982)."

In the instant case even before the dust settled and before petitioners had a chance to catch their breath, they realized that Judge Kral had an invidious predisposition to discriminate because they were lay persons and that they were very tempting innocent targets for an especial temptation and opportunity for the established patently corrupt conduct by respondents. Anyone with any self-respect would

climb the wall and raise "holy hell" if they were set up and their case fixed like petitioners was and they can't do anything about the harassment in the courts.

Respondents' conduct is reminiscent of the horror stories reported during World War II and of the Gestapo tactics that were used in Nazi Germany which should be, but isn't always, foreign to the American judicial way.

In *Dennis* v. *Sparks,* 101 S.Ct. 183 (1980), respondent filed an independent cause of action in the district court and alleged that a state court judge had been corrupted as a result of a conspiracy between the judge and other defendants and deprived him of his property without due process of law. The district court dismissed, the Court of Appeals reversed and certiorari was granted and affirmed. In the instant case, the court did not give petitioners an opportunity to file an amended complaint, because of the abrupt dismissal of their case for lack of jurisdiction. Petitioners properly alleged that there was a conspiracy to deprive them of due process and equal protection of the law because of Hines', Daugherty's and Unknown Co-Conspirators' influence and clout with Kral; and that the objective of the conspiracy was achieved when Judge Kral deprived them of a jury trial by destroying their law counts when he tried the case in Chancery, and entered sanctions and a money judgment against them. The intentional fixing of this case, or any other case, as a result of a conspiracy by a corrupt judge and other respondents, acting under color of state law in the clar absence of all subject matter jurisdiction is a deprivation of property without due process of law.

Because of the dismissal by the district court and because petitioners are lay persons, they were treated differently from the traditional manner in which other litigants are treated by the Court of Appeals denying them an opportunity to amend their complaint.

COVER-UP

Petitioners respectfully suggest, in good faith, that this Court in good conscience, either order an evidentiary hearing or allow them to go outside the record to establish proof that they have, which is not part of this record, of the continuing conspiracy to hinder the due course of justice so that a proper and complete record can be made. In *United States* v. *Cunningham,* 723 F.2d 217 (1983 2nd Cir. U.S. Ct. of App.), the court held at 219:

> "Experience teaches that unlawful coverup offenses are often more heinous than the crime sought to be concealed. This case falls squarely within that maxim."

After reading this Petition, this Court should become, in Alice's words,[3] curiouser and curiouser as to what's going on.

From petitioners' point of view there is decisive evidence that respondents were caught red-handed, acting in bad faith and fixing the case. If this Court agrees, then we have the beginning of the cover-up.

In *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), the court held that the Jurisdictional Rule:

> "Where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit.
>
> ". . . the . . . exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Where federally protected rights have been invaded, courts will be alert to adjust their remedies so as to grant the

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[3] L. Carroll, Alice's Adventures in Wonderland (Children's Classic Ed.) 25.

necessary relief. In *England* v. *Louisiana State Bd. of Med.Exam.*, supra, the court reversed and remanded for further proceedings and held at 464:

> "(1) The court saw the case as illustrating the dilemma of a litigant who has invoked the jurisdiction of a federal court to assert a claimed constitutional right and finds himself remitted to the State tribunals.
>
> "(2-7) There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to a constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. * * *' "

If this Court finds that there was a genuine conspiracy to take petitioners' property without due process of law and that they were denied equal protection of the law, then, under the rationale of *England,* this Court should allow them to return to the district court.

Obviously, petitioners would have to be allowed to amend their complaint in the state court to allege the conspiracy between the state court judge and the other respondents. (See *Conley* v. *Gibson,* 78 S.Ct. 99 (1957) and *Haines* v. *Kerner,* 92 S.Ct. 594 (1972) 404 U.S. 519, 20 L.Ed.2d 652.

THERE IS AN OLD PROVERB THAT "OLD HABITS DIE HARD"

On May 16, 1983, petitioners filed a motion in the Court of Appeals (which they considered) "For This Court to take Judicial Notice of a 6-page, 2 count complaint filed by the Judicial Inquiry Board with the Courts Commission

(and their order), pursuant to *Sec. 15(c)(1) of Article VI of the Constitution of the State of Illinois*[4] against Franklin I. Kral of the Circuit Court Cook County, Illinois." *In Re Judge Franklin I. Kral of the Circuit Court of Cook County,*

> "The Board charges the Respondent with willful misconduct in office, conduct that is prejudicial to the administration of justice and conduct that brings the judicial office into disrepute in Counts I and II hereof."

In the Courts Commission's Order entered December 18, 1973 in Case No. 73-CC-3 ordered:

> "IT IS THEREFORE ORDERED: that under the Commissions' findings, Judge Franklin I. Kral be and he hereby is suspended without pay for a period of two months, effective this date.
>
> Dated this 18th day of December, 1973."

This complaint and order was based on Judge Kral's discussion with an attorney who occasionally appeared before him and was still appearing before him, and might be expected to continue to so appear before him in the future, regarding Kral's purchase of wallpaper and paint at a substantial discount or substantial reduction in price from what he would otherwise have to pay, from a store that the attorney had at one time been an attorney for, and an associate of.

Respondents' conduct throughout the entire litigation is not just one isolated transgression but a well established

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[4] Sec. 15(c)(1) of Article VI: "The Board shall be convened permanently with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute."

scheme to wilfully, knowingly and maliciously obstruct the administration of justice and thwart the judicial process and this type of treatment should shock this Court's conscience and sense of justice.

The concerned citizens of this nation are sensitive to the need for all the courts to be, and remain, above suspicion and dispense justice to all who seek, in good faith, to invoke the protection of the law.

The judiciary should be dedicated to the principle that ours is a government of laws and not of men in a free society and that ignorance of the law is no excuse, and this Court should find that there are sound reasons of public policy involved in the case at bar.

CONCLUSION

For the foregoing reasons, petitioners Arnold Crane and Claire Crane respectfully request that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ARNOLD CRANE
CLAIRE CRANE
2140 Lake Avenue
Wilmette, Illinois 60091
(312) 251-8715
Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted: January 12, 1984*

February 1, 1994

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge

CLAIRE CRANE, ARNOLD CRANE AND CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Plaintiffs-Appellants,

No. 82-2376 vs.

EDWARD HINES LUMBER COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 4493
J. Sam Perry, Judge.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Plaintiffs-appellants appeal from the district court's judgment dismissing their 42 U.S.C. § 1983 action for lack of jurisdiction.[1] Plaintiffs alleged that defendants had conspired to deprive them of their right to a jury trial in a state court proceeding as guaranteed by the seventh amendment and due process clause of the fourteenth amendment.

Sections 1343(3) and 1983 authorize federal courts to entertain suits to redress the deprivation, under color of state law, of rights secured by the Constitution. Plaintiffs' complaint fails to allege such a deprivation.

In *Wartman* v. *Branch 7, Civil Division, County Court, Milwaukee County,* 510 F.2d 130, 134 (7th Cir. 1975), this court made clear that the right to a jury trial in state court is not secured by the seventh amendment. *See also Olesen* v. *Trust Company of Chicago,* 245 F.2d 522, 524 (7th Cir. 1957). Nor is the denial of a jury trial in state court a denial of due process of law under the fourteenth amendment. *Id.*

Accordingly, we affirm the district court's dismissal of this § 1983 action.

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[1] On August 17, 1982, the parties appeared before Judge Perry, who was sitting for Judge Roszkowski, for hearing on a motion for enlargement of time in which to answer filed by defendants Edward Hines Lumber Company and Edward Daugherty. At that time, counsel for defendant Judge Kral moved orally to dismiss the complaint for lack of jurisdiction. The motion was granted, apparently as to all defendants. On August 23, 1982, plaintiffs' motion for reconsideration was denied by Judge Perry. Notice of appeal was filed on August 25, 1982.

APPENDIX B

Unpublished Per Curiam Order

JUDGMENT — WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 1, 1984

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge

CLAIRE CRANE, ARNOLD CRANE AND CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Plaintiffs-Appellants,

No. 82-2376 vs.

EDWARD HINES LUMBER COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82-C-4493
J. Sam Perry, Judge.

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 10, 1984

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge

CLAIRE CRANE, ARNOLD CRANE AND CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Plaintiffs-Appellants,

No. 82-2376 vs.

EDWARD HINES LUMBER COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 4493
J. Sam Perry, Judge.

ORDER

Upon consideration of the pro se petition filed by appellants, Arnold Crane and Claire Crane, in the above-entitled cause, the Court is treating it as a Petition for Rehearing with Suggestion for Rehearing *En Banc.* No judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 9, 1984

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon.

Hon.

CLAIRE CRANE, ARNOLD CRANE AND CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Plaintiffs-Appellants,

No. 82-2376 vs.

EDWARD HINES LUMBER COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 4493
Judge *Stanley J. Roszkowski*

On consideration of the "MOTION FOR STAY OF MANDATE" filed herein on July 16, 1984, by pro se plaintiffs-appellants,

IT IS ORDERED that said motion is hereby DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Mr. H. Stuart Cunningham
Clerk, U.S. District Court
219 South Dearborn Street
Chicago, Illinois 60604

August 22, 1984

Re: CLAIRE CRANE, ARNOLD CRANE AND CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Plaintiffs-Appellants,

vs.

U.S.C.A.-7 No. 82-2376
District Court No. 82-C-4493

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P. 41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal.

Please acknowledge receipt on the enclosed copy of this letter.

Contents of Record:

1 V pleadings
(This is the entire record).

Sincerely yours,

THOMAS F. STRUBBE, Clerk
Lupe Calderon

By: Lupe Calderon

Date: _____ Deputy Clerk

Received above mandate and record from the Clerk of the United States Court of Appeals for the Seventh Circuit.

_____

Clerk of District Court

Copies mailed to:

Arnold Crane and Claire Crane, 2140 Lake Ave., Wilmette, IL 60091

Fran Norek, Office of State Attorney of Cook County, 500 Richard J. Daley Center, Chicago, IL 60602

James T. Ferrini, CLAUSEN, MILLER, GORMAN, CAFFREY & WITOUS, 5400 Sears Tower, Chicago, IL 60606

Note to Counsel:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

APPENDIX F

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable Joseph Samuel Perry (*Roszkowski*)

Cause No. 82 C 4493 Date August 17, 1983

Title of Cause

Claire Crane, et al. v. Edward Hines Lumber Company, et al.

Brief Statement of Motion

Motion for Enlargement of Time to Answer or Otherwise Plead

Names and Addresses of moving counsel

Robert W. Wright
John J. Hurley
KECK, MAHIN & CATE
8300 Sears Tower
233 S. Wacker Drive
Chicago, IL 60606

Representing

Edward Hines Lumber Co. and Edward L. Daugherty

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Claire Crane
Arnold Crane
Claire Crane d/b/a Claire Crane
Construction Company
2140 Lake Ave.
Wilmette, IL 60091

Oral motion of Deft Kral to dismiss is granted and cause is dismissed for want of Jurisdiction.

(Docketed Aug. 19 1982)

/s/ *Perry, J.*

APPENDIX G

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable Perry (*Roszkowski*)

Cause No. 82 C 4493 Date Aug 23, 1982

Title of Cause

CLAIRE CRANE, ARNOLD CRANE and CLAIRE CRANE d/b/a CLAIRE CRANE CONST. COMPANY vs. EDWARD HINES LUMBER CO., EDWARD L. DAUGHERTY, FRANKLIN I. KRAL & UNKNOWN CO-CONSPIRATORS

Brief Statement of Motion

Motion for Reconsideration of this Court's Order Dismissing Plaintiffs' Cause of Action for Lack of Jurisdiction entered August 17, 1982 and Reinstate Plaintiffs' Cause of Action.

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REPRESENTING: Judge Kral

Plfts Motion for reconsideration of Courts order dismissing Plfts cause etc. is denied.

(Docketed Aug 24 1982)

/s/ *Perry, J.*

No. 84-742

Office Supreme Court, U.S.
FILED
DEC 7 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLAIRE CRANE, ARNOLD CRANE and CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Petitioners,

v.

EDWARD HINES LUMBER COMPANY, an Illinois corporation, EDWARD L. DAUGHERTY, FRANKLIN I. KRAL and UNKNOWN CO-CONSPIRATORS, both Jointly and Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, EDWARD HINES LUMBER COMPANY AND EDWARD L. DAUGHERTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COMPLIANCE WITH RULE 28.1

Pursuant to United States Supreme Court Rule 28.1, Edward Hines Lumber Company states that it has the following subsidiaries which are not wholly owned:

Southern Mineral Corporation, Inc.;
Northern Mineral Corporation; and
EHLCO Foundation, an Illinois not-for-profit corporation.

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In The

Supreme Court of the United States

October Term, 1984

CLAIRE CRANE, ARNOLD CRANE and CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Petitioners,

v.

EDWARD HINES LUMBER COMPANY, an Illinois corporation, EDWARD L. DAUGHERTY, FRANKLIN I. KRAL and UNKNOWN CO-CONSPIRATORS, both Jointly and Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, EDWARD HINES LUMBER COMPANY AND EDWARD L. DAUGHERTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF GROUNDS FOR DENYING REVIEW OF CERTIORARI

Petitioners have wholly failed to set forth any basis for review of the dismissal of their action on certiorari. Ignoring the guidelines set forth in Rule 17 of the rules of this Court, the petition merely consists of a general-

ized and unsupported attack on Respondents and the entire judicial system. The plain fact is that the District Court correctly dismissed Petitioners' action for lack of jurisdiction and that ruling was properly affirmed on appeal.

Petitioners' action, brought pursuant to Title 42 U.S.C. §§1343(3) and 1983, was founded on the allegation that they were deprived of their constitutional right to a trial by jury when a decision against them was rendered *in a state court* equity proceeding for foreclosure on a mechanic's lien. It is, however, well settled that the Seventh Amendment is inapplicable to state courts. Moreover, Petitioners' counterclaim seeking damages at law remains pending in the state court and no determination precluding trial by jury has yet been made. Consequently, the complaint was properly dismissed for lack of jurisdiction as being "obviously frivolous" and constitutionally insubstantial.

Additionally, Petitioners' complaint alleged nothing more than that Respondents participated in the judicial process by filing a lawsuit and rendering a decision therein. Such actions, however, cannot form the basis for jurisdiction under section 1983. Although Petitioners may be dissatisfied with the state court holding a bench trial on the mechanic's lien prior to transferring the counterclaim to law division for a jury trial, that decision was required under the applicable state statute governing the trial of equitable and legal matters. If Petitioners feel agrieved, their remedy is to appeal the decision to the state appellate and supreme courts and not to institute a civil rights action in federal court. Moreover, with the counterclaim still pending in state court, the District Court properly stayed its hand in the interests of equity, comity and federalism. As such, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE FAILED TO SET FORTH ANY GROUNDS MERITING REVIEW ON CERTIORARI. THEIR VITUPERATIVE ATTACK ON THE JUDICIAL SYSTEM CANNOT OVERCOME THE FACT THAT THEY HAVE FILED A FRIVOLOUS LAWSUIT.

None of the "considerations governing review on certiorari" set forth in Rule 17 of the rules of this Court are here present. No federal question is involved; there are no conflicting decisions in the Court of Appeals; there is no conflict with any applicable decisions of this Court; and the judgment of the Court of Appeals does not conflict with Illinois law.

On the contrary, the lack of jurisdiction of the federal courts to entertain the instant suit has been well established. In their District Court Complaint, Petitioners asserted that a judgment entered against them by Chancery Judge Kral in foreclosing a mechanics lien in an Illinois state court should be overturned because they were denied their purported right to a jury trial. The alleged basis for the District Court's jurisdiction was Title 42 U.S.C. §1343(3) in that the bench trial purportedly violated Title 42 U.S.C. §1983, the Seventh and Fourteenth Amendments to the United States Constitution.

Initially, it must be noted that the dismissal of Petitioners' Complaint was warranted due to the fact that the allegations of the Complaint failed to allege an existing deprivation of due process or equal protection upon which jurisdiction under Title 42 U.S.C. §1343(3) can rest. See *Humphreys v. Burke,* 502 F.Supp. 449, 452 (D.N.J. 1980).

Although Petitioners complain that they have been deprived of a jury trial on their counterclaim, the assertion is untrue. Judge Kral transferred the counterclaim (which is not described in the record and which could relate to matters having no bearing to the foreclosure action), to law division where it remains pending. No determination precluding trial by jury on the counterclaim has yet been made. While Petitioners speculate that the trial judge will rule that Judge Kral's decision on the foreclosure court precludes a jury trial, ". . . such speculation is an insufficient foundation on which to base federal jurisdiction." *Humphreys v. Burke, supra* at 543; *Cousins v. Wigoda*, 463 F.2d 603, 607 (7th Cir. 1972).

Moreover, Petitioners' claim of a constitutional right to a jury trial in state court is patently frivolous and therefore constitutionally insubstantial mandating dismissal. The issue raised by this case was crystallized in *Hagans v. Lavine*, 415 U.S. 528, 538-39, 94 S.Ct. 1372, 39 L.Ed.2d 577, 578 (1974), wherein this Court stated:

> "Here §§ 1343(3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The district court's jurisdiction, a matter of threshold determination, turned on whether the question was too insubstantial for consideration."

Constitutional insubstantiality results if the lawsuit is "obviously frivolous" (*Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 54 L.Ed. 482, 30 S.Ct. 326 (1910)), or is clearly unsound in light of prior case law. *Ex parte Poresky*, 290 U.S. 30, 31-32, 78 L.Ed. 152, 54 S.Ct. 3 (1933).

The precise issue raised by Petitioners' Complaint was considered and rejected as frivolous in *Wartman v. Milwaukee County Court*, 510 F.2d 130 (7th Cir. 1975), wherein the district court, *sua sponte*, dismissed a §1983 action filed against the state court and an insurance company. As in the case at bar, Plaintiffs there asserted that they had been denied their constitutional right to a jury trial in a suit brought against them in the state court by the insurance company. In affirming the district court's dismissal, the court stated:

> "In the case before us, however, a remand is unnecessary since the district judge's determination that the complaint is frivolous is correct and leave to proceed in forma pauperis could have been denied. *The Seventh Amendment, upon which plaintiffs' claim is grounded, does not apply in state courts.* Moreover, the federal district court does not have jurisdiction over the state, and if we assume the judge of the court is intended as the defendant, he is immune from liability for damages. Finally, the only activity of the insurance company which could be considered as being 'under color of state law' for the purposes of 42 U.S.C. §1983 would be its character as plaintiff in the state court action and this would not be sufficient." (emphasis added) (510 F.2d at 134).

The court in *Iacaponi v. New Amsterdam Casualty Co.*, 258 F. Supp. 880, *aff'd*, 379 F.2d 311, *cert. denied*, 389 U.S. 1054 (W.D.Pa. 1966), similarly held:

> "A litigant in a state court civil action has no constitutional right to a trial by jury under the Seventh Amendment or under the due process clause of the Fourteenth Amendment. A State may establish its own procedures and practices with regard to the conduct of civil litigation including the right of trial by jury. *Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.*, 284 U.S. 151, 52 S. Ct. 69, 76 L.Ed. 214 (1931)." (258 F. Supp. at 884).

Accord: *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1171 n.12 (5th Cir. 1979); *In re Estate of Grabow*, 74 Ill.App.3d 336, 338, 392 N.E.2d 980 (1979).

The law being well settled, both the district court and the court of appeals properly found that Petitioners' claim of a violation of their purported right to a jury trial was "obviously frivolous" mandating dismissal for want of jurisdiction.

II.

JURISDICTIONAL GROUNDS UNDER §1983 OR §1343 ARE ALSO LACKING WHERE, AS HERE, PETITIONERS ALLEGED INJURY RESULTING ONLY FROM "JUDICIAL ACTS." THEIR ATTEMPT TO USE §1983 AS A SUBSTITUTE FOR AN APPEAL IN STATE COURT IS CONTRARY TO LAW.

In addition to erroneously claiming a constitutional right to a jury trial, Petitioners' complaint, stripped of its hyperbole and conclusory statements, alleged nothing more than that Respondents, Hines and Daugherty, filed a lawsuit and produced testimony at trial while Judge Kral did nothing more than make a decision (to try the foreclosure action first) which he was required to make under Illinois Supreme Court Rule 232. That Rule, governing the trial of equitable and legal matters, specifically provides:

> "(a) Trial of a Single Equitable Cause of Action. When matters are treated as a single equitable cause of action as provided in Rule 131(a), they shall be heard and determined in the manner heretofore practiced in courts of equity. When legal and equitable matters that may be asserted separately are pleaded as provided in Rule 135(b), the court shall first deter-

> mine whether the matters joined are properly severable, and, if so, whether they shall be tried together or separately *and in what order.*
>
> (b) Trial of Joined Equitable and Legal Matters. If the court determines that the matters are severable, the issues formed on the law counts shall be tried before a jury when a jury has been properly demanded, or by the court when a jury has not been properly demanded. The equitable issues shall be heard and decided in the manner heretofore practiced in courts of equity." (emphasis supplied). (Ill. Rev. Stat. Ch. 110A, Rule 232).

The mere invocation of the exercise of judicial authority by Hines and Daugherty, however, is not a basis for the assertion of jurisdiction under §1983. The acts of filing a claim, testifying at trial, and representing a client in a legal proceeding do not constitute acts "under color of state law" for §1983 purposes: they are simply private acts. *Grow v. Fisher*, 523 F.2d 875 (7th Cir. 1975); *Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Dahl v. Akin*, 630 F.2d 277 (5th Cir. 1980); *Schaffer v. Cook*, 634 F.2d 1259 (10th Cir. 1980). In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), upon which Petitioners rely, a judge received bribes and illegally enjoined plaintiffs from producing minerals under certain oil leases thereby depriving them of property without due process of law. In contrast, nothing in the record in the instant case indicates that the parties acted outside the confines of the neutral judicial forum. Moreover, Petitioners here have not been deprived of any federal right. As noted *supra*, their claimed "right" to a jury trial is simply inapplicable to state courts.

Nor do the conclusory statements that certain allegations of the foreclosure complaint were untrue and made in bad faith and that Hines, Daugherty and Judge Kral

acted maliciously, oppressively, vindictively and in concert add anything of substance for jurisdictional purposes. Even if Hines and Daugherty could be accused of the tort of abuse of process (and simply by filing a foreclosure action containing unspecified allegations which "were untrue and made in bad faith" (Complt. ¶40), they could not), there still would be an insufficient foundation for jurisdiction under § 1983. *Taylor v. Nichols, supra.* That section ". . . is not designed to be a 'font of federal tort law' " (*Environmental Aid, Inc. v. Goddard,* 433 F.Supp. 906, 913 (W.D. Pa. 1977); *Paul v. Davis,* 424 U.S. 693, 701, 42 L.Ed.2d 405, 413, 96 S.Ct. 1155 (1976)) and the fact that a tort may have been committed by Hines and Daugherty does not mean that a federal constitutional right has been invaded. *Id.; Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187 (5th Cir. 1978).

Moreover, nothing in the record indicates that any of the parties acted outside the confines of the neutral function of a judicial forum. As declared by the court in *Celano v. Celano,* 537 F.Supp. 690, 695 (E.D. Pa. 1982):

> "Since in most instances a judge will 'agree' with one party and disagree with another in rendering a decision, it is evident that more than this simple form of 'agreement' is required to allege joint activity between an attorney, as private party, and a judge, as state official. Otherwise, counsel could state a cause of action under § 1983 whenever a judge was persuaded by the prevailing party to render a decision adverse to the losing party."

See also *Sparkman v. McFarlin,* 601 F.2d 261, 262 (7th Cir. 1979) (Fairchild, C. J., concurring); *Johnson v. Stone,* 268 F.2d 803, 804-05 (7th Cir. 1959).

The underlying issue of Petitioners' complaint is simply whether Judge Kral, pursuant to Illinois Supreme Court

Rule 232, properly tried the foreclosure action before transferring the remainder of the suit to law division. Viewed from this perspective, it is clear that the complaint is nothing more than an improper attempt to have Judge Kral's decision overturned by the federal courts rather than the appellate courts of Illinois.

Section 1983, however, is not a substitute for an appeal to the Illinois Appellate and Supreme Courts. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Environmental Aid, Inc. v. Goddard*, 433 F.Supp. 906 (W.D. Pa. 1977); *Resources for Human Development, Inc. v. Ferber*, 387 F.Supp. 111 (E.D. Pa. 1975); *Reich v. City of Freeport*, 388 F.Supp. 953 (N.D. Ill. 1974), aff'd, 527 F.2d 666 (7th Cir. 1975). As the court so aptly stated in *Environmental Aid, supra* at 911:

> "If summary judgment were to be denied, it would encourage any litigant dissatisfied with a state court decree involving state officials acting under color of law to appeal by bringing a civil rights action in a federal district court without exhausting state appellate remedies."

Petitioners' remedy similarly lies with pursuing those avenues of relief provided by the Illinois appellate process and their federal action was properly dismissed.

III.

EVEN IF, *ARGUENDO* ONLY, THE COMPLAINT STATED A JURISDICTIONAL BASIS, PRINCIPLES OF EQUITY, COMITY AND FEDERALISM REQUIRED DISMISSAL OF THIS CASE.

The remaining pendency of the counterclaim in the law division is an immovable object which repels the force of the complaint even if it does state a jurisdictional basis. It is well settled that principles of equity, comity and

federalism bar interference by federal courts in ongoing state proceedings unless there is no opportunity for plaintiffs to vitiate their constitutional rights either because of bias by the state court judges who will hear the matter at the trial and appellate levels or because the state statute under which the litigation arose is unconstitutional in every word, paragraph and clause. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).

Neither precondition has been met in the instant case. There has been no allegation of bias nor that Illinois Supreme Court Rule 232 is unconstitutional. Indeed, it would be totally incongruous for Petitioners to allege that Rule 232 is unconstitutional since they base their claim upon its alleged violation. Additionally, the state courts are competent to rectify any purported violation of Petitioners' constitutional rights. See *Bateman v. South Carolina State Port Authority*, 298 F.Supp. 999 (D.S.C. 1969); *Lynch v. Snepp*, 472 F.2d 769, 774 (4th Cir. 1973). Under these circumstances, abstention is required. *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486; *Huffman v. Pursue, Ltd., supra.*

CONCLUSION

For all of the foregoing reasons and upon the authorities cited, the Petition for *Writ of Certiorari* should be denied.

Respectfully submitted,

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